

Protest of) Date: March 30, 1993
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INTERNATIONAL SERVICE)
ASSOCIATES, INC.)
)
Solicitation No. 036364-93-A-0002) P.S. Protest No. 92-98

DECISION

International Service Associates, Inc., (ISA) protests the award of a contract for security guard services to Burns International Security Services (Burns) under solicitation 036364-93-A-0002.

The Support Services office of the Phoenix, AZ, Division issued the solicitation seeking proposals for the provision of 24-hour uniformed unarmed guard services at the Phoenix Rio Salado Facility. According to the solicitation, one or two guards were to be provided for twelve-hour shifts at the facility. As amended by amendment A01, Section M.2 of the solicitation, Contract Award and Proposal Evaluation, provided as follows:

1. Evaluation for award will primarily be based on price-related factors. The prospective contractor will be required to provide business references and information on employee hiring practices. The Postal Inspection Service will conduct a background check and must approve the contractor prior to award being made. The Postal Inspection Service reserves the right to conduct background checks on contractor employees and require their replacement if found to be unsatisfactory.^{1/}

Price was to be calculated on the basis of a weekly total extended for a 52-week year, plus additional costs associated with the provision of service on ten identified holiday periods.^{1/}

^{1/} Prior to Amendment A01, this portion of section M.2 had read as follows:

a. Award will be made to the responsible offeror whose proposal offers the best value to the Postal Service, (i.e. a combination of price, price-related factors, and/or other factors). The primary areas to be used in determining which proposal offers the best value to the Postal Service are listed below in descending order of importance:

1. Approval of the Postal Inspection Service
2. Price-related factors

^{2/} The solicitation acknowledged that evaluation in this fashion included some double-counting since the

ISA, whose corporate headquarters is in Downers Grove, IL, offered the service at the lowest evaluated price. Burns, whose corporate headquarters is in Phoenix, offered the second-lowest evaluated price. Following the opening of proposals, Inspector T. C. Hall of the Postal Inspection Service conducted a telephone interview with representatives of ISA, including Mr. Ed Silva, ISA's Director of Contracts Management and Administration. Inspector Hall's memorandum of that interview recited various elements of ISA's plans with respect to staffing for the Rio Salado contract, including the following:

- ISA would advertise locally in the Phoenix area for already trained personnel, some full-time and some part-time. Five or six people would be needed to staff one guard post on a 24-hour basis.
- The most qualified recruit would become shift or site supervisor, and one additional supervisor would be designated for the primary supervisor's days off.
- ISA would use a system wherein personnel for the next shift must call in ahead of time to assure that there are no problems. Backup personnel are also to call four hours before shift change and again at shift change to determine if they are needed. A person on a guard post cannot leave until properly relieved.
- In response to a question, ISA "stated in the event of an emergency they would have to go out and hire more people . . . they would have some applicants already screened from those they did not hire initially."
- "When asked about emergencies requiring ISA, Mr. Silva said someone from ISA would fly to Phoenix to work out any problems or concerns that arose." "[A]sked again about emergencies such as multiple illnesses, no shows, multiple firings, people quitting, and/or an immediate need for increased personnel, Mr. Silva stated any new hiring would be done primarily by ISA from Illinois [T]he process of hiring more new people would require some reasonable notice."

Following Inspector Hall's interview, the Phoenix Inspector in Charge wrote the contracting officer to express his concerns with ISA's contingencies for emergencies. His November 25 letter includes the following:

[I]n the event of an emergency which required additional personnel, [ISA] would have to go to previously accepted applications and hire more people. This could take days to complete and is not an acceptable contingency for an emergency. Therefore, due to the apparent lack of readily available resource alternatives to address emergent security concerns, ISA is not recommended by the U. S. Postal Inspection Service for the security guard force contract award at the Rio Salado facility.

holidays also were included within the 52-week schedule.

The contracting officer adopted the Inspection Service's view. A December 21 memorandum to the file by the contracting officer includes the following:

Inspector Hall stated that ISA's hiring practices, background checks, and training methods would be acceptable but their contingency plan for emergencies would not be sufficient. Because their office is located in a different state, they would not have an available pool of employees that could be utilized if someone suddenly became ill or resigned. Their plan is to keep applications on file and hire people as needed. Based on this information, Inspector Hall recommended that ISA not be considered for award.

I agreed with Inspector Hall's findings and eliminated ISA from consideration. . . . It would seem only logical that a company would have a difficult time keeping people on staff solely to cover emergencies. This would be compounded for an out-of-state contractor who did not have other locations that they were servicing.

The contracting officer made award to Burns. ISA was advised that its proposal did not meet the approval of the Inspection Service "because of inadequate contingency plans for emergencies. It was determined that [ISA's] plan for replacing employees on short notice would not meet the needs of the Postal Service."

ISA's protest followed. While the initial protest asserts various grounds to challenge the exclusion of ISA's proposal,^{3/} it became clear in the course of the protest that what had in fact occurred was that ISA had been found nonresponsive because of its lack of a satisfactory contingency plan with respect to employee hiring.^{4/} As to that issue, ISA contends that the Postal Service either misunderstood ISA's contingency plans or imposed an excessive requirement with respect to them.

In this regard, ISA's Mr. Silva notes in a declaration which accompanied the protest that in his conversation with Inspector Hall he explained how backup security officers would be on call to replace security officers who called in sick or did not show up for their tours. The protester contends that similar plans have proven successful at numerous other contracts managed by ISA.

^{3/} The protest contends, alternatively, that ISA's proposal was improperly evaluated on the basis of a factor (the availability of a contingency plan) not stated in the solicitation; that ISA's proposal was improperly found technically unacceptable or nonresponsive on grounds (the existence and non of adequate contingency plans) which relate to responsibility; that ISA's adequate and satisfactory contingency plan was misconstrued or misinterpreted; that Inspector Hall's telephone conversation may have constituted an improper discussion because ISA was not informed of any deficiencies or allowed to correct them; or that there may have been an improper evaluation tradeoff between price and technical factors.

^{4/} The contracting officer's report on the protest recites the information set out above with respect to Inspector Hall's telephone interview of ISA. The contracting officer states that ISA's failure to convince the Inspection Service that [its contingency] plans were adequate was the sole reason ISA was eliminated from consideration. . . . ISA was found . . . nonresponsive for this reason."

The contracting officer's statement is accompanied by a further letter from Inspector Hall which notes that the Postal Service's Administrative Support Manual assigns to the Inspection Service the "sole responsibility for evaluating the need for any security related equipment and or personnel," and that "[e]mployment and assignment of . . . guard services to provide security at [p]ostal facilities is prohibited[] unless such employment or assignment is authorized in writing by the Chief Postal Inspector or his designee." Inspector Hall notes the main concern of any guard force is "its ability to respond to emergencies" or contingencies, and finds troublesome ISA's objection to being asked to address its contingency plans because they were not specified in the solicitation.

Commenting on the contracting officer's report, ISA contends that the Inspection Service improperly concluded that ISA lacked adequate contingency plans because it inquired only about ISA's short-term plans. ISA contends that its back-up system for immediate shift coverage is fully satisfactory for immediate "fill-in" replacements, and that it was not asked how it would respond to a "catastrophic" emergency requiring the replacement of the majority of its personnel.¹⁷ ISA contends that it should have been asked for its written plans in that respect.

Following a telephonic protest conference, ISA furnished additional information, including copies of information previously supplied to the contracting officer with respect to its other contracts. That information identified numerous contracts in several states, some of which involved the provision of relatively small numbers of guards (from two to four), in situations where there were no other similar local contracts. ISA also provided further detail on the procedures which it would use to substitute personnel from its Headquarters or from its contracts in nearby states in the event they were necessary.

Following this submission, the contracting officer was asked to supplement his report in four areas:

1. Whether the materials reflecting ISA's performance on its other contracts were available to Inspector Hall when he made his determination of ISA's suitability, and if the contracting officer or Inspector Hall made inquiry to any of the contracting officers identified in those materials.
2. To the extent that the protester disagreed with Inspector Hall's account of his telephone conversation with Mr. Silva, Inspector Hall was asked to respond to those disagreements.
3. The Inspection Service was asked to clarify whether its concern was that ISA's approach is not feasible (and if so, why?), or that ISA had not explained that approach in Inspector Hall's discussions.
4. Because the file appeared susceptible to a reading that the emergencies with

^{5/} Noting the accessibility of Phoenix by air, ISA explains that it would fly temporary replacements to Phoenix from its headquarters or from its contracts in nearby states to provide the required services until local replacements could be hired.

which the Inspection Service was concerned might involve instances in which the contractor might be required to furnish more staff than the contract required, the contracting officer was asked whether that reading was correct, and if so, what contractual mechanism could require the contractor to provide additional personnel.

Procurement Manual (PM) 4.5.7 i. requires contracting officers to respond to such requests for additional information within ten working days. When a timely response was not forthcoming because of a lack of Inspection Service input, the contracting officer was requested to reply without further delay. As to the first inquiry, the contracting officer advised that Inspector Hall was provided some, but not all, of the information in ISA's submitted material, and that the contracting officer had contacted three of the references furnished from other contracts, concluding from those contacts that IPA's performance was satisfactory without inquiring specifically about IPA's personnel contingency procedures. The contracting officer was unable to comment on the second and third inquiries. As to the fourth, the contracting officer expressed his understanding that the Inspection Service was primarily concerned about the adequacy of IPA's procedures with respect to internal personnel needs due to illness and resignations, but that external incidents which might require additional personnel were also a concern. The contracting officer asserts that the Inspection Service had been advised that the contract would require modification if additional personnel were to be supplied.^{1/}

Commenting on this response, the protester urges us to draw an adverse inference from the Inspection Service's failure to respond to the inquiries, and to conclude accordingly that ISA's proposed contingency plan is inherently feasible. The protester restates its entitlement to the award.

Discussion

The legal standard by which this office reviews a contracting officer's determination that an offeror is nonresponsible is well settled:

A responsibility determination is a business judgment which involves balancing the contracting officer's conception of the requirement with available information about the contractor's resources and record. We well recognize the necessity of allowing the contracting officer considerable discretion in making such a subjective evaluation. Accordingly, we will not disturb a contracting officer's determination that a prospective contractor is nonresponsible, unless the decision is arbitrary, capricious, or not reasonably based on substantial information.

T/F Trucking, P.S. Protest No. 92-65, October 22, 1992, citing Craft Products Company, P.S. Protest No. 80-41, February 9, 1981.
In the instant case, the contracting officer deferred to the Inspection Service's

^{6/} Inspector Hall subsequently provided additional comments which were not further considered due to their substantial untimeliness.

conclusions about the protester's responsibility. While such deference is not inappropriate, it directs our attention to the reasonableness of the underlying conclusions of the technical experts to whom the contracting officer has deferred. TRW Financial Systems, Inc., P.S. Protest No 91-19, May 29, 1991.

When faced with differing contentions of fact presented by the contracting officer and a protester, we adopt the factual position of the contracting officer. T & S Products, P. S. Protest No. 90-06, March 9, 1990. Accordingly, to the extent that the protester's account of Inspector Hall's interview differs from the Inspector's, we adopt the latter account.

As set out above, the Inspection Service's concern with ISA's contingency plans had to do with its acquisition of additional personnel in the event of significant reductions in its employee staff. (Nothing in the Inspection Service's comments appears to challenge the adequacy of ISA's day-to-day fill-in and backup staff procedures.) Its concern arises from ISA's acknowledgment that finding replacements in such a situation would occupy some finite period of time, and assumes, as a result, that the Rio Salado guard posts would not be staffed in the interim. The basis for that last conclusion is lacking on this record.

While the Inspection Service and the contracting officer may well be correct that a local contractor with other employees could handle such an emergency more easily than ISA, the record provides no basis for the conclusion that ISA could not handle it. Inspector Hall's memorandum of the telephone interview does not include the apparently critical question ("How would the guard positions be staffed while additional personnel were hired?"), so ISA had no opportunity to answer it.

We do not understand ISA's position to be that it was inappropriate to inquire about its plans for contingencies, but rather that in the absence of advice to that effect in the solicitation it was incorrect to require ISA to plan for every possible contingency no matter that the contingency was improbable or remote ("What if your local personnel quit and the airport were closed?") or that the contingency was outside the scope of the contract ("How would you provide staffing if six guards were suddenly needed per shift?"). That latter view is correct.

Here, the solicitation gave no indication that the contractor would be required to provide staffing in excess of that which the contract required, but according to the contracting officer (whose view is not unreasonable on this record) the Inspection Service was concerned that emergencies might require such staffing, and faulted ISA for its inability to accommodate it. To the extent that the Inspection Service's determination was based on that unstated requirement, it was arbitrary and capricious.

Similarly, to the extent that the contracting officer relied solely on the Inspection Service's determination^{1/} that ISA lacked an adequate contingency plan to deal with

^{1/} We do not understand the section of the Administrative Services Manual quoted by Inspector Hall to delegate to the Inspection Service the unfettered authority to determine the acceptability of security guard contractors, but rather to delegate to it the authority to determine when such services are to be

internal staff shortages without considering ISA's past satisfactory performance record in similar circumstances, that reliance was also arbitrary. Review of the material submitted by ISA should have suggested that the hiring problem which the Inspection Service identified would have been common to ISA's widely dispersed contracts, and should have occasioned further inquiry to determine whether ISA's handling of that problem was satisfactory.

Having concluded that ISA's responsibility was improperly determined, we must remand the matter to the contracting officer. Upon remand, the contracting officer must determine whether the solicitation properly set out the Postal Service's needs, including specific advice concerning contingency hiring planning and the fulfillment of requirements in excess of the solicitation's initial requirements. If it did not, the solicitation should be revised and the service resolicited under terms and conditions which will allow the consideration of the Postal Service's actual concerns.

If, on the other hand, it is determined that the original solicitation was satisfactory, ISA's responsibility should be reevaluated in a manner consistent with PM 3.3.1 and this decision.

Upon the selection of a contractor under a new solicitation or the determination that ISA is responsible, the incumbent contract should be terminated for the convenience of the Postal Service on a schedule which will allow continuity in the provision of the needed guard services.

The protest is sustained.

For the General Counsel:

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Contract Protests and Policies

provided. Reading the section in this manner avoids any conflict with PM 3.3.1e.'s direction that it is the contracting officer who is to determine contractor responsibility.